BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 1997-239-C - ORDER NO. 2005-78

FEBRUARY 28, 2005

IN RE: Proceeding to Establish Guidelines for a Universal Service Fund	)	ORDER DENYING
	)	REHEARING AND/OR
	)	RECONSIDERATION OF
	)	ORDER NO. 2004-573

This matter comes before the Public Service Commission of South Carolina ("Commission") upon the petitions of the Acting Consumer Advocate for the State of South Carolina ("Consumer Advocate") and the South Carolina Cable Television Association ("SCCTA") for rehearing and/or reconsideration of Commission Order No. 2004-573, issued on November 18, 2004 in the above-captioned docket.

A. Consumer Advocate Petition

The Consumer Advocate first asserts that in Order No. 2004-573, this Commission reaffirmed its findings from prior orders concerning the State Universal Service Fund (State USF). The Consumer Advocate goes on to allege that the case of United Telephone Company of the Carolinas (Sprint) suffers from the same legal infirmities as set forth in the Consumer Advocate's appeal of Commission Order Nos. 98-322, 2001-419, 2001-704, 2001-996, and 2001-1088, which is currently pending before the South Carolina Supreme Court. The Consumer Advocate then incorporates the legal arguments set forth in its Brief before the Supreme Court into its Petition by reference, including, but not limited to purported violations of S.C. Code Ann. Section 58-9-280(E),

an alleged violation of 47 U.S.C. Section 254(k), and alleged violations of FCC Separations requirements set forth in 47 C.F.R. Part 36. We believe, as we have stated before, that these allegations are without merit. Our findings and conclusions were fully set forth in the referenced orders, which have been affirmed by the Circuit Court. Order of the Honorable J. Ernest Kinard, Jr., dated September 30, 2002 ("Order of Judge Kinard"). The Commission's position with respect to the appeal of those issues, which is currently before the Supreme Court, is fully set forth in our Joint Brief with the South Carolina Telephone Association in the referenced appeals. This portion of the Consumer Advocate's Petition in therefore denied.

The Consumer Advocate also cites the portion of our Order No. 2004-573 which stated that the amount of funding requested by Sprint in this case, when combined with the funding received from the first phase, does not exceed 2/3 of its company-specific State USF, and therefore Sprint is not required to update the results of its cost studies for basic local exchange service. According to the Consumer Advocate, these findings are not supported by the evidence in this case. The Consumer Advocate states that at no time, and in no prior order in this case has the Commission actually determined a total amount for the State USF or any company-specific amount for the State USF. Thus, the Consumer Advocate asserts that there is no way to determine whether the amounts requested by the LECs do not exceed 1/3 or 2/3 of the total, when there has been no determination as to what the total is.

As the Circuit Court concluded, the Commission acted properly in accordance with its statutory mandate, and in the public interest, in sizing and ordering

implementation of the State USF. See Order of Judge Kinard, at 21, 43. The Commission sized the fund according to the statutory formula provided in S.C. Code Ann. Section 58-9-280(E). See Commission Order No. 2001-704 at 5, 9-10, Order of Judge Kinard at 20-24, TR of third USF proceeding at Vol. V, pp. 1188-90 (July 21, 2000), and Hearing Exhibit No. 11 in the third USF proceeding. The Commission determined the cost of providing basic local exchange service for each carrier of last resort, including the company requesting funds in the instant proceeding, and sized the fund based on the difference between the cost and the maximum amount each carrier of last resort could charge for the service. See Commission Order No. 98-322, Commission Order No. 2001-704 at 5, 9-10, Order of Judge Kinard at 20-24, TR of third USF proceeding at Vol. V, pp. 1188-90 (July 21, 2000), and Hearing Exhibit No. 11 in the third USF proceeding. The State USF has been sized, according to the statutory formula, and this Commission properly determined that the amount of additional funding requested by Sprint did not exceed 2/3 of the LEC's company specific State USF amount cost studies for it.

For all of the reasons discussed above, we find that the Consumer Advocate's allegations are without merit, and the Consumer Advocate's Petition for Reconsideration of Commission Order No. 2004-573 is denied and dismissed.

B. SCCTA Petition

Also filed with this Commission was a Petition for Rehearing or Reconsideration of Order No. 2004-573 by the South Carolina Cable Television Association ("SCCTA"). SCCTA likewise challenges Commission Order No. 2004-573 on the same grounds as

those contained in its appeal of the Commission's prior State USF orders. SCCTA also raises issues in its petition that were raised by the Consumer Advocate in the pending consolidated appeal before the South Carolina Supreme Court. Those matters have already been decided by this Commission, our Orders have been affirmed in all respects by the Circuit Court, and the Supreme Court will decide those issues upon review of the Circuit Court Order.

SCCTA also incorporates additional errors it alleges were made in Order Nos. 2001-419 and 2003-215, orders issued by this Commission in a previous phase of implementation of the State USF. Like the matters included in the Supreme Court appeal, matters that were raised previously have already been disposed of by this Commission and will not be re-addressed here.

In addition to grounds previously asserted, SCCTA states five additional alleged errors contained in Order No. 2004-573. First, SCCTA alleges that the Commission has not established a mechanism pursuant to Section 58-9-280(E)(4) for adjusting any inaccuracies in the estimate to establish the size of the fund. Again, as noted above, the Circuit Court has ruled that the Commission acted appropriately in sizing the Fund. See Order of Judge Kinard at 20-24. No fault with the Commission's procedure in sizing the Fund was found by the Circuit Court, nor did that Court find any defects in any of the Commission's methodologies. Accordingly, this allegation is without merit.

A second additional allegation of error in Order No. 2004-573 by SCCTA is that the Commission erroneously permitted Sprint to reduce the carrier common line charge and intrastate local switching charges and to recover those reductions from the USF,

which, according to SCCTA, is impermissible under S.C. Code Section 58-9-280(C)(5) & (E), since basic local exchange service is the only service expressly supported by the USF. The allegation is without merit. Clearly, the carrier common line charge and intrastate local switching charges are very closely related to basic local exchange service, and have clearly been used to subsidize basic local exchange service in the past. Since the purpose of the USF is to remove implicit subsidies to basic local service, it makes perfect sense to us to remove a portion of those subsidies by approving reductions in the carrier common line charge and intrastate local switching charges, and thus allowing reimbursement from the USF. We believe that this allegation is most certainly without merit.

The third allegation of error in Order No. 2004-573 by SCCTA is that this Commission failed to require the petitioners to provide relevant evidence of how the cost estimates of the services under analysis relate to the cost of providing any other service offered by the carrier. This allegation is also without merit, and is inconsistent with our holding in Order No. 2001-419. In that Order, we stated only that in order to receive funding beyond the initial step, any local exchange carrier applying for further reductions under the State USF must file detailed cost data with the Commission *clearly demonstrating that implicit support exists in the rates that are proposed to be reduced* (emphasis added). See Order 2001-419 at 35, paragraph 12. The Order says nothing about having to relate the cost estimates of the services under analysis to the cost of providing any other service offered by the carrier. This allegation is without basis in law or fact.

The next allegation of error by SCCTA is that this Commission erroneously relied on the petitioners' own statements concerning the economic effects of rate decreases in violation of Section 58-9-280(E). Unfortunately, SCCTA does not point to any section of Order No. 2004-573 where this was supposed to have been done. However, the Commission clearly pointed out that "along with the tariff filings, Sprint filed a detailed cost study clearly demonstrating that implicit support exists in the rates that are sought to be reduced, as required by paragraph 12 of Commission Order No. 2001-419." See Commission Order No. 2004-573 at 2. Therefore, this Commission clearly relied on appropriate cost evidence in reaching its conclusions in Order No. 2004-573, and this allegation of SCCTA is also without merit.

In addition, SCCTA alleges that this Commission violated the Due Process Clause of the Fourteenth and Fifth Amendments of the U.S. Constitution, S.C. Constitution Art. I, Section 3 and IX, Section 1, and unlawfully delegated the power to regulate to the Petitioners in violation of S.C. Code Sections 58-3-140 and 58-9-280(E)(4). Assuming that SCCTA is alleging that the Commission unlawfully delegated its power to regulate to the Petitioners under all the named provisions of the U.S. and State Constitutions and state statutes, the allegation is most definitely without merit. The power to regulate the State Universal Service Fund and those companies which would seek reimbursement from that Fund remains with the Commission. The Commission has spent years in proceedings developing its regulatory methodologies in this area. Clearly, under the present case, Sprint proposed a decrease in certain rates, with the ultimate goal of eliminating implicit subsidies, which would then potentially be reimbursable from the

State USF. This Commission retains the power to approve or disapprove the suggested tariff changes. In Order No. 2004-573, this Commission believed that there was evidentiary support for approval of the tariff reductions. However, this Commission could have just as easily disapproved those tariff reductions, if we believed that the evidence did not support them. In other words, this Commission continues to regulate and control the process. The Companies may apply for appropriate tariff reductions, but this Commission reserves the right to approve or disapprove them. Accordingly, this allegation of SCCTA is also without merit, as there is no "delegation."

Further regarding our Order No. 2004-573, SCCTA raises one of the same issues put forth by the Consumer Advocate, that is, an issue related to the size of the fund and the Commission's finding that the amount of funding requested by the LECs in this case does not exceed 2/3 of the company-specific State USF for Sprint. We have already addressed this issue above, and believe that the point should be addressed similarly herein in response to the SCCTA's Petition.

In paragraph 7 of its Petition, SCCTA argues that the Commission's State USF guidelines are flawed in that the phased-in plan allows ILECs to continue to receive subsidies from implicit sources as well as explicit funding from the State USF, and there is no mechanism to determine how much implicit support is generated through the ILECs' rates. This is similar to SCCTA's argument in opposition to our prior Order No. 2003-215 that there is no evidence of the extent to which the rates to be reduced are providing implicit support for basic local exchange service. To the contrary, and as we stated in our Order No. 2003-345 denying reconsideration of Order No. 2003-215, the

Commission has sized the State USF based on the difference between the cost of providing basic local exchange service and the maximum amount that can be charged for such service. This defines the amount of support for basic local exchange service that is currently being derived from rates for other services offered by the carrier. The amount by which those other rates are priced above their respective cost is the amount of implicit support for basic local service built into those other rates. Furthermore, SCCTA seems to be attempting to argue that the guidelines and procedures may allow companies to over-recover from the State USF. As we stated in Order No. 2004-452, these concerns are unfounded because the State USF is revenue-neutral. The Commission requires that each eligible LEC must make dollar-for-dollar reductions in rates containing implicit support before the LEC can withdraw explicit support from the State USF. Commission Order No. 2004-542 at 24-25; see also TR at 76; Commission Order No. 2001-419 at 42; Section 4 of the Guidelines for State USF, attached as Exhibit A to Commission Order No. 2001-996. Therefore, SCCTA's contention is without merit.

In paragraph 8 of its Petition, SCCTA argues that Order No. 2004-452 violates 47 U.S.C. Sections 254(f) and (k) because the State USF Guidelines do not provide sufficient information for the Commission to prevent discrimination and cross subsidization. This is similar to arguments that have been raised by the SCCTA and the Consumer Advocate in previous petitions and appeals. It is essentially another attempt to collaterally attack the models and methodologies that were adopted and approved by this Commission in our Order No. 1998-322 following the cost proceeding in this docket. Any properly preserved issues and arguments relating to the cost models and

methodologies are being addressed in the SCCTA's direct appeal of Order No. 1998-322 as appropriate, and we will not re-address them here.

In paragraph 9, SCCTA alleges that Order No. 2004-452 violates S.C. Code Ann. § 58-9-280(E)(6) in that the State USF Guidelines to not include sufficient regulatory safeguards with respect to the submission of updated cost studies. First, this is similar to prior arguments and, like the argument raised in paragraph 8 of its Petition, is an attempt to collaterally attack the models and methodologies that were adopted and approved by this Commission in our Order No. 1998-322 following the cost proceeding in this docket. As stated above, any properly preserved issues and arguments relating to the cost models and methodologies are being addressed in the SCCTA's direct appeal of Order No. 1998-322 as appropriate, and we will not re-address them here.

Additionally, we note that SCCTA's factual allegations on this point are simply wrong. SCCTA first asserts that the Guidelines do not include sufficient regulatory safeguards with respect to the submission of cost studies. To the contrary, as we stated in Order No. 2001-419, we held lengthy hearings to address cost models and methodologies in this docket, hearing evidence through 5 days of hearings that included the testimony of 25 witnesses, including economic, financial, engineering, and cost experts, among others. See Commission Order No. 2001-419 at 41. Our Order further required that the results of these cost studies be updated by each LEC before that LEC's State USF withdrawal exceeds one-third of its company-specific State USF amount. Id. at 42. As we found in Order No. 2004-573, the cost study filed by Sprint clearly demonstrate that implicit support exists in the rates it seeks to reduce. Order No. 2004-573 at 10.

For the reasons stated herein, SCCTA's and the Consumer Advocate's petitions for rehearing and/or reconsideration of Commission Order No. 2004-573 are denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice-Chairman

(SEAL)